

Adoption: 10 October 2014
Publication: 3 March 2015

Public
Greco RC-III (2014) 7E

Third Evaluation Round

Addendum to the Second Compliance Report on Spain

"Incriminations (ETS 173 and 191, GPC 2)"

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"Transparency of Party Funding"

Adopted by GRECO
at its 65th Plenary Meeting
(Strasbourg, 6-10 October 2014)

I. INTRODUCTION

1. The Addendum to the Second Compliance Report assesses further measures taken by the authorities of Spain, since the adoption of the First and Second Compliance Reports, in respect of the recommendations issued by GRECO in its Third Round Evaluation Report on Spain. It is recalled that the Third Evaluation Round covers two distinct themes, namely:
 - **Theme I – Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173), Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).
 - **Theme II – Transparency of party funding:** Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).
2. The Third Round Evaluation Report was adopted at GRECO's 42nd Plenary Meeting (15 May 2009) and made public on 28 May 2009, following authorisation by Spain (Greco Eval III Rep (2008) 3E, [Theme I](#) and [Theme II](#)). The subsequent Compliance Report was adopted at GRECO's 50th Plenary meeting (1 April 2011) and made public on 12 April 2011, following authorisation by Spain ([Greco RC-III \(2011\) 5E](#)). The Second Compliance Report ([Greco RC III \(2013\) 20E](#)) was adopted at GRECO's 60th Plenary Meeting (21 June 2013) and made public on 11 July 2013, following authorisation by the Spanish authorities.
3. In accordance with Rule 31 revised, paragraph 9 of its Rules of Procedure, GRECO's Second Compliance Report invited the Head of the Spanish delegation to submit additional information regarding the nine recommendations that had been only partly or not implemented at all. The information was provided on 31 March 2014 and served as a basis for the Addendum to the Second Compliance Report.
4. GRECO selected Estonia and Italy to appoint Rapporteurs for the compliance procedure. The Rapporteurs appointed for the Second Compliance Report were Mr Urvo KLOPETS (Estonia) and Mrs Vania MAFFEO (Italy). They were assisted by GRECO's Secretariat in drawing up the Second Compliance Report.

II. ANALYSIS

Theme I: Incriminations

5. It is recalled that GRECO in its Evaluation Report addressed nine recommendations to Spain in respect of Theme I and that recommendations i, ii, vii, viii and ix had been implemented satisfactorily. Recommendations iii, iv, v and vi were partly implemented.
6. The authorities report on a number of draft amendments to the Penal Code (PC) which would trigger further progress in the implementation of GRECO recommendations. In this context, on 20 September 2013, the Spanish Council of Ministers approved the submission to Parliament of amendments to the PC. The Bill was published in the Official Gazette on 4 October 2013 and is currently undergoing parliamentary discussion¹; it forms part of a legislative/policy package to

¹ http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-66-1.PDF

better fight corruption (so-called “*pacto de regeneración democrática*”) which is driven by the government and is expected to be adopted by December 2014.

Recommendation iii.

7. *GRECO recommended to (i) clarify the notion of foreign public official; (ii) enlarge the scope of Article 445 PC concerning active bribery of foreign officials and officials of international organisations beyond situations involving international business transactions; (iii) criminalise passive bribery of foreign officials and officials of international organisations; and (iv) ensure that bribery of members of foreign public assemblies, international parliamentary assemblies (other than members of the European Parliament), as well as judges and officials of international courts (other than those serving in the International Criminal Court) is criminalised.*
8. GRECO recalls that in the Second RC-report it assessed this recommendation as partly implemented pending the enactment of the draft amendments to the Penal Code (PC) which would cover active bribery of foreign officials and international organisations beyond situations involving international business transactions (recommendation iii, part ii), as well as passive bribery of those categories of officials (recommendation iii, part iii).
9. The authorities of Spain indicate that the draft amendments are still on the legislative agenda, but have not yet been adopted. The authorities recall that the draft amendments contain a new Article 427 PC which includes a definition of foreign public officials and officials of international organisations – comprising the different categories of persons covered by the Criminal Law Convention on Corruption (ETS 173), and extends the application of the pertinent provisions on active and passive bribery of domestic public officials to cover both foreign and international organisation officials. In addition, the draft amendments provide for a separate autonomous offence of bribery of foreign public officials in international business transactions in Article 286ter PC, which is then governed by specific jurisdiction provisions in Article 286quinquies PC.
10. Pending adoption of the reported draft amendments to the PC, GRECO can only conclude that recommendation iii remains partly implemented.

Recommendation iv.

11. *GRECO recommended to (i) review Article 422 (bribery of jurors and arbitrators) of the Penal Code to ensure that the criminalisation of bribery of jurors and arbitrators is in line with the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191); and (ii) criminalise bribery of foreign arbitrators and jurors.*
12. GRECO recalls that bribery of domestic jurors and arbitrators is specifically criminalised in Article 423 PC. At the time of adoption of the Second RC-III, further legislative changes had been anticipated by the authorities in order to criminalise bribery of foreign jurors and arbitrators. Until those changes materialised in practice, GRECO considered recommendation iv as partly implemented.
13. The authorities of Spain reiterate their plans to provide for the criminalisation of bribery of foreign jurors and arbitrators; they envisage positive developments in this respect in the coming months, according to the parliamentary agenda and the way in which the discussion of the draft amendments to the PC evolves.

14. In this state of affairs and pending the effective criminalisation of foreign jurors and arbitrators in Spanish criminal law, GRECO can only conclude that recommendation iv remains partly implemented.

Recommendation v.

15. *GRECO recommended to criminalise bribery in the private sector in accordance with Articles 7*
16. GRECO positively assessed the amendments introduced in legislation to criminalise bribery in the private sector (an area where specific provisions were lacking in the past), pursuant to Article 286bis PC. GRECO, however, remained dubious as to whether the aforementioned offence of passive bribery in the private sector (the request, receipt or acceptance of the promise of an undue advantage) did indeed cover all the conduct listed in the Criminal Law Convention on Corruption (ETS 173). Consequently, GRECO assessed recommendation v as partly implemented.
17. The authorities of Spain claim that the draft amendments to the PC which criminalise the offence of abuse of position in the private sector (Article 252 PC) would suffice to cover passive bribery in the private sector, since the perpetrator of the offence would cover anyone who has management powers in the company concerned.
18. GRECO reiterates the view it took in its Second RC-III Report concerning the offence of abuse of authority in the private sector and its pertinence to fully meet the requirements of the Criminal Law Convention on Corruption (ETS 173) as regards passive bribery in the private sector. In particular, GRECO notes that the Convention is clear as to the coverage of the perpetrators of the offence of bribery in the private sector, i.e. “any persons, who direct or work for, in any capacity, private sector entities”; therefore, not restricting its scope just to those who are entrusted with management positions.
19. GRECO concludes that recommendation v remains partly implemented.

Recommendation vi.

20. *GRECO recommended to (i) criminalise active trading in influence as a principal offence; (ii) criminalise trading in influence in relation to foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies and judges and officials of international courts; and (iii) clarify beyond doubt that immaterial advantages are covered by the relevant trading in influence provisions in the Penal Code.*
21. GRECO welcomed the efforts made by the authorities to align the offence of trading in influence in Articles 428 and 429 PC with the Criminal Law Convention on Corruption (ETS 173). It remained dubious, however, as to the criminalisation of active trading in influence and the coverage of the relevant trading in influence provisions with respect to foreign and international officials. GRECO considered the recommendation as partly implemented.
22. The authorities of Spain reiterate that it is possible to punish a trader in influence by virtue of Article 428 PC (which criminalises the exertion of influence “*the public official or authority that influences another public official or authority*”) and Articles 28 and 65(3) PC (general rules on participation which would allow the punishment of any individual who promises, gives or offers an undue advantage, as an instigator of the offence). As to whether trading in influence of foreign

and international officials is criminalised, the authorities indicate that, pursuant to the draft amendments to the PC, in particular Article 427 (see also paragraph 8), it would be possible to apply the provisions of trading in influence of domestic public officials to foreign and international officials.

23. With respect to recommendation vi (i), GRECO takes note of the arguments presented by the authorities, but can only stress that they do not differ from those submitted previously and do not sufficiently address the question of the punishment of the active trader in influence who is not a public official and who does not effectively exert his/her influence.
24. With respect to recommendation vi (ii), i.e. the criminalisation of trading in influence of foreign and international officials, GRECO remains unconvinced. GRECO already noted in its Second RC-III Report that the reported draft amendments to the PC – extending the applicability of the provisions on domestic public officials to foreign and international officials – only refer to the offences of bribery (Articles 419 to 425 PC), and therefore, leave out of their scope the offence of trading in influence (which is regulated later in Articles 428 and 429 PC).
25. GRECO concludes that recommendation vi remains partly implemented.

Theme II: Transparency of Party Funding

26. It is recalled that GRECO in its Evaluation Report addressed six recommendations to Spain in respect of Theme II and that recommendation v had been dealt with in a satisfactory manner. Recommendations i, ii, iii, iv and vi remain partly implemented.
27. The main legislative instrument governing political finance, i.e. Law 8/2007 on Political Parties Funding, was amended by Law 5/2012 of 22 October 2012 to introduce greater transparency, oversight and enforcement in this domain. In February 2013, the Parliament adopted a resolution on a wide range of anti-corruption measures, including, *inter alia*, measures to increase transparency and strengthen control of party funding. A draft Bill on the Control of Economic Activities of Political Parties, which amends the applicable legislation with respect to parties and their finances, was tabled before Parliament a year later, in February 2014². The draft is undergoing parliamentary discussion/amendment; it is expected to be adopted by December 2014. The draft contains a number of changes on different fronts, e.g.:
 - (i) Limits, transparency and control of donations
 - ban on the acceptance of corporate donations to political parties (this ban does not, however, apply to their related entities);
 - ban on the acceptance of private donations from physical persons with engagements in a public sector contract;
 - ban on debt cancellation;
 - obligation to donate through a bank transfer to dedicated party accounts.
 - (ii) Accounting and auditing obligations
 - consolidation of the accounts of party branches at national and subnational level (including local accounts);
 - publication online of greater details on party accounts (balance sheet, and profit and loss account);
 - appointment of a person responsible for financial dealings;

² http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-82-1-C1.PDF

- auditing of related entities' accounts by the Court of Audit.
- (iii) Sanctions
- detailed list of infringements coupled with more varied sanctions.

Recommendation i.

28. *GRECO recommended to take appropriate measures to ensure that loans granted to political parties are not used to circumvent political financing regulations.*
29. GRECO, in its Second RC-Report, welcomed the new provisions on loans introduced by Law 5/2012, pursuant to which, loans are considered a source of private funding that are no longer exempted from the thresholds on contributions from individual donors. This said, GRECO regretted that the law did not provide clearer obligations regarding the publicity of the terms of contracted loans. Consequently, GRECO assessed recommendation i as partly implemented.
30. The authorities of Spain now report that the draft Bill on the Control of Economic Activities of Political Parties completely bans debt cancellation, whether totally or partially, by credit institutions. This ban would apply to both political parties and their related foundations. A new obligation is imposed on political parties to publish on their respective websites, within one month of the submission of their accounts to the Court of Audit, details on their finances, including their balance sheet and their profit and loss account. The latter would comprise information concerning the amount of outstanding loans³, the corresponding awarding entity, the amount granted, the interest rate and the period of repayment. The latest report of the Court of Audit on political finances, including details on loans, dates from May 2014 and refers to the years 2009 to 2011⁴. Details on political financing corresponding to 2012 are included in a separate report sent by the Court of Audit to the Parliament in July 2014, which currently awaits formal approval by the latter.
31. GRECO welcomes the novelties introduced by the draft Bill on the Control of Economic Activities of Political Parties, as explained above, to further increase transparency of contracted loans. This draft does, however, need to materialise in practice. With respect to the ban on debt cancellation, GRECO recalls that the situation of political parties being in debt, and the potential that such a situation could have on the vulnerability of political parties vis-à-vis credit institutions, has been an important source of concern in Spain.
32. GRECO concludes that recommendation i remains partly implemented.

Recommendation ii.

33. *GRECO recommended to take measures to increase the transparency of income and expenditure of (i) political parties at local level; (ii) entities, related directly or indirectly, to political parties or otherwise under their control.*
34. GRECO assessed this recommendation as partly implemented. Whilst recognising the positive steps taken to subject political foundations and associations to tighter accounting and reporting obligations of both their income and their expenditure, GRECO took the view that more could still be done to consolidate the accounts of political party branches, notably at local level, as well as the accounts of related entities. GRECO also expressed its misgivings as to the possibilities

³ The notion "outstanding loans" refers to the amount of debt coming from loans granted to political parties which would have not been cancelled or expired once the draft Bill on the Control of Economic Activities of Political Parties comes into force.

⁴ <http://boe.es/boe/dias/2014/05/12/pdfs/BOE-A-2014-5010.pdf#BOEn>.

provided by law, by virtue of the applicable exceptions, to funnel “interested” money to political foundations or associations.

35. The authorities of Spain now indicate that the draft Bill on the Economic Activities of Political Parties requires the consolidation of the accounts of political parties and their branches at regional and local level. As to related entities, the draft Bill provides for a definition of the activities which would link a given foundation/association to a political party. It further subjects the accounts of connected entities to the control performed by the Court of Audit.
36. GRECO welcomes the new measures reported. In particular, as regards the transparency of political parties at local level. GRECO is of the strong view that more determined action would be appropriate with a view to increasing the transparency and control of the accounts of related entities. GRECO again reiterates its concern as to how the final provisions of the draft Bill dealing with related entities open up possible ways to go around the applicable requirements on political donations. For example, while political parties are banned from receiving corporate donations, the latter are permitted if channelled through related entities. Moreover, GRECO notes that the Court of Audit has repeatedly advocated for the consolidation of party accounts, including not only the accounts of all party branches at national and subnational level, but also of the accounts of party related entities. This recommendation of the main oversight body of political finances in Spain has not been echoed in the draft Bill. GRECO urges the authorities to revisit the applicable rules concerning related entities so that they are not used as channels to circumvent the rules on party funding. It will also be important that any new definition of the activities that link a given association/foundation is broad enough not to exclude relevant related entities.
37. GRECO concludes that recommendation ii remains partly implemented.

Recommendation iii.

38. *GRECO recommended to establish a common format for parties’ accounts and returns (at both head office and local level) with a view to ensuring that the information made available to the public is consistent and comparable to the greatest extent possible, and that it is disclosed in a timely manner within the deadlines prescribed in Law 8/2007 on Political Parties Funding, thus allowing a meaningful comparison both over time and between parties.*
39. GRECO assessed this recommendation as partly implemented. A common format for parties’ accounts and returns as well as guidance to parties on how to comply with their duties under the law was on the pipeline. An obligation had been placed on political parties to publish their accounts online; however, the latter obligation had not been coupled with effective implementation arrangements as to their timeliness, including effective deadlines to be respected and a sanction in case of non-compliance.
40. The authorities of Spain indicate that a common format for parties’ accounts and returns was issued by the Court of Audit in 2013⁵. The authorities further add that the draft Bill on the Economic Activities of Political Parties now incorporates a clear deadline for parties to publish their accounts online following their submission to the Court of Audit, rather than waiting for the Court of Audit to issue its monitoring reports on political financing, which was the case before in the law (the deadline for submission to the Court of Audit is by 31 March of the accounting year, and the obligation to report is to follow in a maximum of one month thereafter). A party that has not published its annual accounts as per the deadline set by law will have its public subsidies

⁵ <http://www.boe.es/boe/dias/2013/10/21/pdfs/BOE-A-2013-10982.pdf> .

withheld. Moreover, the draft Bill requires broader information disclosure requirements for political parties which must now publish online in greater detail (e.g. on terms of loans, on identity of major donors, etc.). The draft Bill also incorporates new provisions to help the Court of Audit meet its requirement to publish monitoring reports on party funding in a timely manner, notably, by placing an unequivocal obligation on third parties to cooperate (e.g. regarding the obligation of financial entities to facilitate information on party accounts) and levying fines in case of non-compliance.

41. GRECO notes the changes reported to increase timely and comprehensive disclosure of party accounts, as well as to facilitate the oversight task of the Court of Audit in this area of public concern. GRECO has always held that transparency of party accounts is key to helping identify questionable financial ties and possible corruption in the party funding system both in reality and in the perception that citizens may have of the situation. For this reason, GRECO considers it crucial to maximise the amount, and timeliness, of information which can be acquired by the public in this sensitive domain.

42. GRECO concludes that recommendation iii remains partly implemented.

Recommendation iv.

43. *GRECO recommended to take measures to enhance the system of internal audit of political parties in order to ensure the independence of this type of control.*

44. GRECO took note in the Second RC-Report of the auditing requirements included in Law 5/2012. GRECO, nevertheless, took the view that there was additional room for improvement concerning systems of internal control and financial discipline within political parties themselves. It urged the authorities to advance in this area and assessed recommendation iv as partly implemented.

45. The authorities of Spain now report that the draft Bill on the Economic Activities of Political Parties sets in place a clear obligation for political parties to develop systems of internal control, failure to do so constitutes a serious infringement of the law resulting in fines from 10 000 to 50 000€. Political parties can additionally be subject to criminal liability and must put in place legal compliance systems (i.e. develop a corruption prevention and accountability policy, as per the obligation laid out in the Penal Code regarding legal entities, Article 9bis).

46. GRECO takes note of the plans reported to put in place tighter internal control mechanisms for political parties, including through the appointment of financial officers with professional and deontological exigencies, the development of legal compliance systems to promote integrity and accountability, the submission of party accounts to independent auditors, the introduction of a stricter accountability system for political parties, etc. Taking into account the series of scandals in connection with the irregular financing of political activity that have led the Spanish citizens to fiercely question its political class, GRECO considers the implementation of this recommendation as vital to the credibility of the system and its effectiveness in practice. GRECO urges the authorities to take prompt action in this respect.

47. GRECO concludes that recommendation iv remains partly implemented.

Recommendation vi.

48. *GRECO recommended to clearly define infringements of political finance rules and to introduce effective, proportionate and dissuasive sanctions for these infringements, in particular, by*

extending the range of penalties available and by enlarging the scope of the sanctioning provisions to cover all persons/entities (including individual donors) upon which Organic Law 8/2007 imposes obligations.

49. GRECO acknowledged the steps taken to strengthen the sanctioning regime for party funding violations (in particular, in respect of campaign funding rules). That said, GRECO assessed this recommendation as partly implemented and called for additional steps to extend the range of penalties and enlarge the scope of the penalty provisions to cover all persons/entities subject to obligations under the law.
50. The authorities of Spain now refer to significant developments concerning the sanctioning regime laid out in the draft Bill on Economic Activities of Political Parties which now contains escalating sanctions directly linked to the illegal act performed by political parties, their responsible officers or donors, as well as related entities. These sanctions can be enforced by the Court of Audit. They do not exclude criminal liability in the terms established by the Penal Code. More particularly, pursuant to Law No. 7/2012, political parties became subject to corporate criminal liability. In addition, the draft amendments to the PC include additional sanctions for illegal political financing (i.e. false accounting of political parties, improper management of funds of political parties, and illegal funding of political parties).
51. GRECO welcomes the new developments reportedly aimed at enhancing the accountability regime for political actors. The sanctions proposed in the draft Bill on Economic Activities of Political Parties are of an economic nature and the fines are incremental depending on the seriousness of the infringement; they are complemented by criminal sanctions. GRECO draws the attention of the authorities to the statute of limitations regime proposed in the draft Bill on Economic Activities of Political Parties and its sufficiency to ensure that irregular financing does not go unpunished. More particularly, depending on the seriousness of the infringement made, the statute of limitation ranges from one to four years; the limitation period for the less serious infringements (e.g. non-cooperation with the Court of Audit, non-submission of party accounts) being set in the draft at one year. In GRECO's view, this period risks being short, all the more given the delays in the supervision performed by the Court of Audit – a problem already highlighted in GRECO's former reports on Spain in this domain. The soundness and credibility of the system could certainly be compromised if infringements of the rules are not coupled, in law but also in practice, with effective sanctions.
52. GRECO concludes that recommendation vi remains partly implemented.

III. CONCLUSIONS

53. **With the adoption of this Addendum to the Second Compliance Report on Spain, GRECO concludes that out of the fifteen recommendations issued to Spain, six in total have been implemented satisfactorily or dealt with in a satisfactory manner.** The nine remaining recommendations have been partly implemented.
54. With respect to Theme I – Incriminations, recommendations i, ii, vii, viii and ix have been implemented satisfactorily; recommendations iii, iv, v and vi still remain partly implemented. Regarding Theme II – Transparency of Party Funding, recommendation v has been dealt with in a satisfactory manner; recommendations i, ii, iii, iv and vi still remain partly implemented.

55. There are now two new Bills, addressing many of the shortcomings identified by GRECO in its previous reports concerning both themes under evaluation, which currently await adoption in Parliament. Concerning incriminations, GRECO recalls that following the adoption of the Third Round Evaluation Report, Spain ratified the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). This was an important step forward which also led to several amendments in the formulation of corruption offences in domestic legislation pursuant to which the criminalisation of bribery and trading in influence in the Spanish Penal Code is largely in line with the Council of Europe standards. The draft Bill amending the Penal Code, when adopted, will further address the limited deficiencies signalled by GRECO regarding the international dimension of corruption, notably, with respect to bribery and trading in influence of foreign and international officials, foreign jurors and arbitrators, and to the particular coverage of passive bribery in the private sector.
56. In so far as the transparency of political funding is concerned, the applicable law was already amended in 2012, which resulted in enhanced transparency, oversight and enforcement requirements in this area (e.g. additional bans on the sources of funding to political parties, further regulation on loans, publication requirements for political parties and related associations/foundations, etc.). The draft Bill on Economic Activities of Political Parties proposes some positive changes with respect to transparency, internal control and accountability of political parties. Nevertheless, the authorities must persevere in their efforts to enhance transparency of political accounts and the relevant sources of income received and expenditure incurred (including those of party local branches), monitoring the situation of indebtedness of political parties, and ensuring that any infringement of the applicable rules is coupled, not only in law but also in practice, with effective sanctions. Moreover, it must be ensured that political foundations and associations are not used as a parallel avenue for funding routine and campaign activities of political parties in spite of the applicable restrictions and thresholds set by law for the latter. Given the number of scandals regarding irregular party funding that have rocked the Spanish political system in recent years, it is of vital importance for the credibility and effectiveness of such a system that the Spanish authorities take prompt action in this domain and provide for tangible improvements without delay.
57. GRECO urges the Spanish authorities to take determined and prompt action with a view to addressing the aforementioned outstanding recommendations. In accordance with Rule 31, paragraph 9 of its Rules of Procedure, it requests the Head of the delegation of Spain to submit additional information on the implementation of iii, iv, v and vi (Theme I – Incriminations) and recommendations i, ii, iii, iv and vi (Theme II – Transparency of Party Funding) by 31 July 2015.
58. GRECO invites the authorities of Spain to authorise, as soon as possible, the publication of the report, to translate the report into the national language and to make this translation public.